

RULE-MAKING SUSPENSION UPDATE

December 8, 2010

As part of Governor Gregoire's Executive Order (10-06) to temporarily suspend non-critical rule development, her policy office issued [guidelines](#) to help agencies decide which rules should be suspended.

Below is Ecology's initial determination of which rulemaking should move ahead and those that should be delayed for a year. These are in addition to Ecology's Nov. 17, 2010 announcement of the first group of rules that would proceed. The list will include several rules that Ecology anticipates to be under development in 2011.

I believe it's important that these decisions are made sooner rather than later to help foster stability and predictability for stakeholders, and allow Ecology to plan and prioritize staff workload.

I'd like your feedback on our initial determination list between now and Friday (Dec. 3). Send comments to rulemaking@ecy.wa.gov. I intend to announce our final decision on Monday, Dec. 6.

Thanks for your participation in Ecology's rule-making work.

A handwritten signature in blue ink, appearing to read "Ted Sturdevant".

Ted Sturdevant
Director, Department of Ecology

We have identified three groups of Ecology rules:

1. Rules that Ecology plans to delay further development until January 2012.
2. Rules for continued development in 2011.
3. Rules that Ecology is awaiting decisions from local government, Tribes and or the legislature before making a determination.

See the tables on the following pages for details related to each group.

1. **RULES ECOLOGY PLANS TO DELAY FURTHER DEVELOPMENT UNTIL JANUARY 2012**

Our initial analysis indicates that the timing of the following rules in process could accommodate a one-year delay. The timing for implementing these is not as critical as others in development now.

Rule process	Purpose	Effect of delay
Model Toxics Control Act WAC 173-340	The MTCA rule provides a framework for making cleanup decisions; periodic updates enable incorporating new science and new regulatory requirements.	The MTCA rule includes flexibility to make decisions on a case-by-case basis; Ecology expects more site specific decisions and increased demand for technical support. Stakeholder concerns on vapor intrusion addressed during rulemaking discussions can be incorporated into guidance. Ecology anticipates resuming rulemaking after the one year suspension.
Mercury lights New rule	Ecology would adopt rules to set fees to continue running the state's product stewardship program for mercury-containing light bulbs. The law requires those that produce these types of bulbs fund a program to collect, transport and recycle their mercury lights. The amount described in law covers start up costs but not continued expenses.	Ecology didn't anticipate beginning a rule process until late 2011. A delay until January 2012 could be accommodated.
Solid waste handling standards WAC 173-350	In order to expand organics recycling, certain provisions of current state solid waste rules may need amending.	Ambiguities in the existing rule language that sparked legal challenge in 2009 will continue, and the state will lose an opportunity to continue expanding organics recycling in the state.
Reclaimed water WAC 173-219	The rulemaking addresses all aspects of reclaimed water, including commercial and industrial uses, land applications, direct recharge, wetland discharges, stream flow augmentations among others.	Ecology can use the delay to focus on developing guidance about reclaimed water that answers concerns raised by some stakeholders. Reclaimed water facilities are already permitted using existing authority given to Ecology and state Health.
Samish River subbasin	This rule amendment would establish	Ecology has limited staff

Rule process	Purpose	Effect of delay
instream flow WAC 173-503A	for the Samish Basin in WRIA 3 instream flows, identify amounts of water available for future water rights processing and identify streams for closure.	resources for rulemaking.
Dangerous waste regulations WAC 173-303	Ecology needs to update the state's rules for dangerous waste, including both optional and required federal changes, as well as correcting language conflicting requirements.	The benefit of these updates will be mostly felt by a small number of hazardous waste generators – primarily small universities or colleges. These stakeholders haven't asked Ecology to continue pursuing updates.
Outdoor burning WAC 173-425	This planned update would make administrative and process improvements related to burning in outdoor containers, as well as add definitions to make Washington's rules consistent with the EPA.	These regulatory changes can wait until 2012, but will delay improvements in rule clarity and streamlining that benefits those businesses and residents who may be subject to the regulations.
Lower emission vehicles WAC 173-423	Ecology anticipated updating its rules in 2011 to ensure consistency with California clean car standards.	Under federal law, states that opt into the California clean air standards must periodically update state rules to align with recent changes in the California program. These administrative changes could be delayed for a year.
Solid fuel burning devices WAC 173-433	This expected rule process would update sections of the woodstove rule to further reduce emissions, align the rule with proposed 2011 legislation and incorporate EPA's planned 2011 rule revisions. This would help in Washington's efforts to improve air quality in "non-attainment" areas affected by pollution from woodstoves.	This process can wait until 2012, when it's clear what legislation passed and the EPA rule revisions are finalized. Delay beyond 2012 will affect the state's ability to address sources of pollution driving federal "non-attainment" area designations.
Diesel engine idle reduction New rule	This is new rulemaking to provide significant reductions in heavy duty diesel emissions while reducing engine maintenance and operating costs.	Fewer diesel emissions mean lower cancer risk and less respiratory and cardiovascular disease. These increased health benefits will be delayed until a rule is eventually implemented.

2. RULES FOR CONTINUED DEVELOPMENT IN 2011

Most of Ecology's rules that will continue in 2011 meet the third criterion in the Governor's [exemption guidelines](#):

- 3a - Required by federal or state law or required to maintain federally delegated or authorized programs;
- 3b - Required by court order;
- 3c - Necessary to manage budget shortfalls, maintain fund solvency, or for revenue generating activities;
- 3d - Necessary to protect public health, safety, and welfare or necessary to avoid an immediate threat to the state's natural resources; or
- 3e - Beneficial to or requested or supported by the regulated entities, local governments or small businesses that it affects.

As Ecology's rule work is driven by state or federal mandate and could be classified for exemption under criterion 3a, we felt it was important to cite where possible other relevant exemption criteria as a reason to continue development of these rules.

Any rule Ecology moves forward has either already had the appropriate small business and local government consultations or will.

Rule process	Purpose	Exemption criteria
Sediment Management Standards WAC 173-204	Addressing the impact of bioaccumulative chemicals is an important step needed to restore and protect Puget Sound. Moving ahead with this rule update will resolve existing ambiguities over setting sediment cleanup levels that protect human health.	3d - Necessary to protect public health. Rule adoption would clarify requirements and provide direction for cleanup actions. This rule work has been requested or supported by regulated entities, local governments, or small businesses. Resolving the confusion around cleanup of contaminated sediments appears to be a widely recognized priority.
Underground storage tanks (UST) WAC 173-360	USTs present a very real risk of groundwater and soil contamination. This rule update would bring Washington into compliance with new federal standards and make it easier for owners of UST systems to prevent leaks and other system	3a – necessary to maintain federally-delegated program and funding for the work. Federal grants (\$1.8 million) that cover the state's costs of the UST program require compliance with federal regulations and would be put

Rule process	Purpose	Exemption criteria
	failures that pollute.	at risk without this update.
Motor vehicle air emissions inspection WAC 173-422	The Legislature directed Ecology to expand the available pool of businesses that can test car emissions. This rule change would adjust the criteria so more businesses could contract with the state to do this work. The rule criteria need to be updated well ahead of the next contract window for emissions testing (July 2012) so businesses can prepare to qualify to offer this service.	3e – Small businesses would see their opportunity to do this work expand.
Water quality standards WAC173-201A	Portions of the surface water quality standards contain information that needs to be corrected or clarified. Continuing work on this rule amendment will make the rule easier to understand and more accurate. At least one permit and two water quality improvement processes are affected by incorrect information in the existing rule.	3e – Stakeholders have asked Ecology to continue work on this rule correction effort. One permittee has appealed its permit based on these errors, and has indicated the case could be resolved with these corrections.
Columbia Basin Project (groundwater) WAC 508-14	This would amend an existing rule to help provide better clarity around the amount of available groundwater for the Columbia Basin Project. This will provide certainty to water users who currently do not have the security of a water certificate.	3e – The rule amendment would encourage economic growth and generate revenue for businesses and local communities through helping provide reliable and sustainable water for users.
Water rights rule amendment (Hillis) WAC 173-152	Recent legislation directs Ecology to “aggressively pursue” new water supplies in the Columbia River basin. However, without this rule amendment, Ecology can’t prioritize water right decisions as the law directs.	3e – Rule adoption would provide more flexibility in getting water to pending water right applicants, supporting small business and economic growth.
Certified Water Rights Examiner program New rule	The 2010 Legislature passed a law to generate funding for the Water Resources program and reduce a workload backlog associated with water rights	3e – Affected permittees, mainly cities, utilities and the agricultural community, supported the development of this position because it would

Rule process	Purpose	Exemption criteria
	processing. Setting up this portion of the law, including a new fee to help cover program costs, requires Ecology to develop a rule. Moving ahead without the new fees would cost state taxpayers more.	increase Ecology's efficiency. Actual rule development is poised to proceed pending legislation being introduced in the 2011 session.
Brake pads New rule	Recent legislation requires brake pad manufacturers to phase out certain toxic metals (including copper) from brake pads. Ecology plans to pursue a rule to establish a "proof of certification" mark for packaging; set up data collection regarding the amount of toxic metals in brake pads sold in Washington; and create an exemption process.	3e – Ecology is receiving letters from brake pad manufacturers urging the agency to continue rulemaking so there are clear criteria for manufacturers to meet when the law takes effect in 2013.
Criteria for Municipal solid waste landfill WAC 173-351	Ecology needs to adopt new federal regulations into its rules for municipal landfills to ensure full federal approval of Ecology's program. Regulated landfill owners requested Ecology pursue this rulemaking to adopt the necessary federal changes.	3e – Stakeholders requested Ecology seek full federal delegation of the program from EPA for municipal solid waste landfills. This rulemaking will accomplish this request.
Industrial air quality permit fees WAC 173-455	This rule would adjust permit fees for sources that plan to construct or modify their existing operations to more fully cover the costs of the workload associated with these permits. Current costs are more than the fees collected by Ecology. Other streamlining improvements are also being proposed to simplify processes and associated application fees for businesses.	3c – Ecology has legislative approval to increase these fees. That fee increase authority under Initiative 960 expires June 30, 2011. If fees aren't increased, there will be considerable delays in permitting approval.
Dam Safety WAC 175-175	The legislature directed Ecology to increase dam construction permit and inspection fees to help offset the actual cost of Ecology's work to administer the program. Rules are required for making any changes to a fee program.	3c – The additional permit and inspection fees would go into the state general fund.

3. PENDING DECISIONS FROM LOCAL GOVERNMENT, TRIBES, AFFECTED PARTIES OR THE LEGISLATURE

The following list shows rules that await a decision from others, including legislative action, before Ecology can decide whether a delay is appropriate or the rulemaking should move forward.

Title	Purpose	Effect of delay
Spokane County Shoreline Master Program (SMP) WAC 173-26-070	If a local government fails to adopt an updated SMP by the schedule in statute, Ecology is required to adopt an SMP for that local government. This is accomplished by adoption of a rule. Spokane County has adopted an updated SMP. However, the document fails to meet requirements of the SMP Guidelines. Ecology rulemaking is the alternative if we cannot come to agreement with the County on a mutually acceptable SMP.	Proceeding with rulemaking is being held while Ecology works with Spokane County toward a mutually-acceptable SMP. This is our preferred route. If we cannot reach agreement with the County, Ecology will need to complete this rule to adopt an adequate updated SMP for Spokane County.
Elwha-Dungeness instream flow rule (WRIA 18) New rule: WAC 175-518	Implement the locally-adopted watershed plan by setting instream flows, mitigating new development, metering new water uses and developing new sources of water to meet community needs.	Consensus building continues among stakeholders for developing pathways that include tailored mitigation, new water supply projects as well as a draft rule. Ecology has worked closely with the watershed committee on the rule process for several years. Although our goal is local consensus, Ecology is still responsible for moving forward with rulemaking if consensus is not reached.
Grays-Elochoman, Cowlitz instream flow rules (WRIAs 25, 26) New rules: WAC 175-525, WAC 175-526	Implement the locally-adopted watershed plans by setting instream flows, establishing water reserves for future use, and closing certain sensitive areas to further withdrawals.	The watershed planning group is revisiting elements of their plan, and Ecology is working closely with this team to ultimately revise the draft rules. New rule

Title	Purpose	Effect of delay
		recommendations could come from the group in late spring 2011.
Shellfish/Shoreline Management Act WAC 173-18 WAC 173-20 WAC 173-22 WAC 173-26 WAC 173-27	The three basic topics addressed in this rule update are summarized below.	The comment period just closed on 11/23 for these proposed rule amendments. We are considering the submitted comments in determining the appropriate route forward.
<ul style="list-style-type: none"> • Geoduck/Shellfish 	Geoduck aquaculture is an acceptable use of state shorelines. This rulemaking is designed to address conflicts between the industry and others over aquaculture operations. It will provide critical information to Puget Sound communities undergoing shoreline master program updates now.	
<ul style="list-style-type: none"> • Limited amendments 	The rule amendment would correct existing outdated language that significantly restricts the ability of cities and counties to make minor adjustments in their Shoreline regulations.	
<ul style="list-style-type: none"> • “housekeeping” amendments 	These proposed housekeeping updates would make corrections and provide clarification in the existing rule.	
Wastewater discharge permit fees WAC 173-224	State law requires Ecology to collect fees from wastewater and stormwater discharge permit holders to cover the permit program costs. These fees currently fall short. Ecology plans to propose a rule to increase the fees for those	3c – The costs of administering the permit program aren’t in synch with the fees collected. This increase would only apply to permit categories not currently covering the cost of administering the permits and

Title	Purpose	Effect of delay
	permit-types that are currently underfunded.	is contingent on legislative budget approval in the 2011 session.
Water service contracts New rule	Ecology is proposing legislation in 2011 to provide the option of using cost recovery contracts for work to develop new Columbia River Basin water supplies. Ecology would likely pursue rulemaking in late 2011 or early 2012 to establish the cost recovery methodology.	3e – This would provide reliable and sustainable water supplies for communities and users in Eastern Washington. Several groups that advise Ecology on water issues have given their support. This is contingent upon legislative approval.